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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 VIRGINIA L. GIUFFRE,

4 Plaintiff,

5 v.

21 Civ. 6702 (LAK)

6 PRINCE ANDREW,

7 Defendant.

Oral Argument

8 -----x
9 New York, N.Y.
January 4, 2022
10:00 a.m.

10 Before:

11 HON. LEWIS A. KAPLAN,

12 District Judge
13

14 APPEARANCES (Via Microsoft Teams)

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Attorneys for Plaintiff

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1 THE DEPUTY CLERK: Good morning. This is Judge
2 Kaplan's clerk. Giuffre v. Prince Andrew.

3 Counsel for plaintiff, are you ready?

4 MR. BOIES: Yes, we are.

5 THE DEPUTY CLERK: Could you please put your
6 appearances on the record.

7 MR. BOIES: This is David Boies of Boies Schiller &
8 Flexner. With me in my office in Armonk is Andrew Villacastin
9 and Mary Boies of my firm. Other members of the firm have
10 joined remotely and will identify themselves.

11 THE DEPUTY CLERK: Thank you.

12 Counsel for defendant, are you ready?

13 MR. BRETTLER: Yes. Good morning, we're ready. This
14 is Andrew Brettler of Lavelly & Singer. I'm joined by my
15 colleague Melissa Lerner of Lavelly & Singer.

16 THE DEPUTY CLERK: Thank you.

17 THE COURT: All right. Good morning, everybody.

18 MR. BOIES: Good morning, your Honor.

19 MR. BRETTLER: Good morning, your Honor.

20 THE COURT: For the benefit of those on the audio
21 connections, let me say that any broadcasting or audio or video
22 recording of these proceedings is strictly prohibited.

23 Let me just get adjusted here and we'll start right
24 off.

25 Okay. Mr. Brettler, it's your motion. I will figure

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1 about 20 minutes a side, but we may run over.

2 MR. BRETTLER: Thank you, your Honor.

3 Good morning and happy new year.

4 THE COURT: Same to you.

5 MR. BRETTLER: Thank you very much.

6 I think we should jump right into the issue of the
7 release, your Honor. All of the arguments obviously are fully
8 briefed in our opening motion and in our reply, but I think
9 that the release is the place to start.

10 Prince Andrew contends that the 2009 settlement and
11 release agreement that she entered into with Jeffrey Epstein
12 unequivocally bars any claims that she could assert against
13 Prince Andrew.

14 The language of the release is agreement is extremely
15 broad, as your Honor, I'm sure, has noticed. The agreement
16 itself releases other potential defendants whom Giuffre could
17 have sued. The "other potential defendants" is not specified
18 who those individuals are by name, but Ms. Giuffre's complaint
19 in that 2009 action suggests who they may be.

20 Ms. Giuffre has alleged that Jeffrey Epstein
21 trafficked her to a number of individuals, forced her into sex
22 slavery, and she claims that she was forced to have sex or be
23 sexually abused by many people, including members of academia,
24 including businessmen and the category of royalty.

25 There would be no doubt that by the time that

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1 Ms. Giuffre entered into the 2009 --

2 THE COURT: Excuse me, Mr. Brettler.

3 MR. BRETTLER: Yes, your Honor.

4 THE COURT: Isn't it true as a literal matter that
5 anyone in the world could have been sued in that action? All
6 you have to do is include the name of the person in the
7 caption?

8 MR. BRETTLER: No, not at all, your Honor. I mean, of
9 course in this country anyone can pay a filing fee and sue
10 anybody, but it needs to be a viable claim. And the category
11 or the universe of --

12 THE COURT: So that if the somebody you wanted to add
13 was not subject to the jurisdiction of the Court, that's not a
14 viable claim, right?

15 MR. BRETTLER: Well, we would argue, your Honor,
16 Prince Andrew certainly was subject to the jurisdiction of the
17 Southern District of Florida court by virtue of the nature of
18 the allegations.

19 In that lawsuit Ms. Giuffre accused Mr. Epstein of
20 running a sex trafficking enterprise of which all of these
21 other individuals and entities, including Prince Andrew,
22 Professor Dershowitz, many others, were coconspirators of
23 Mr. Epstein. And just by that allegation alone --

24 THE COURT: A complaint could have been filed that
25 named the head football coach at the University of Kansas,

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1 right? Not to pick on Kansas.

2 MR. BRETTLER: Well, certainly, your Honor, again, in
3 this country anyone can file a lawsuit against anyone if you
4 pay the filing fee. But there was never a contemplation in the
5 actual complaint that Ms. Giuffre filed in 2009 that the head
6 football coach of Kansas participated in any wrongdoing. There
7 was an allegation in her complaint that she was sex trafficked
8 to members of royalty and to businessmen and to members of
9 academia. The broad release language of "other potential
10 defendants" had to mean something. You know, it goes beyond
11 Mr. Epstein, his lawyers, and his associates, because those
12 parties were defined as second parties in the agreement.

13 THE COURT: Why couldn't it reasonably be understood
14 as meaning others who could have been brought within the power
15 of the Florida court and as to whom a judgment could have been
16 entered on the merits in the event the plaintiff prevailed?

17 Why not?

18 MR. BRETTLER: It certainly could mean that, your
19 Honor. In which case --

20 THE COURT: Isn't that the end of this point then? If
21 it could mean that, and it could mean what you say, isn't it as
22 a matter of law ambiguous and a question for a jury?

23 MR. BRETTLER: No. It's certainly not ambiguous, your
24 Honor. The intent is plainly written in the agreement itself,
25 where it defines Jeffrey Epstein and his attorneys and his

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1 associates as second parties, and then it includes a second
2 category of releasees called "other potential defendants."

3 Based on the plain reading of the agreement, there is
4 no ambiguity that there were intended third-party
5 beneficiaries.

6 Sorry. I heard somebody speak.

7 There would be no question, there's no ambiguity that
8 "other potential defendants" had some meaning ascribed to it,
9 and Ms. Giuffre intended to release many other individuals
10 beyond the second parties, Mr. Epstein, his attorneys, his
11 associates, and employees.

12 THE COURT: Why couldn't she have intended to release
13 other people who were subject to the personal jurisdiction of
14 the Florida court?

15 MR. BRETTLER: I think it does mean that, your Honor.
16 The meaning of "other potential defendants" certainly would
17 include anyone who is subject to the potential jurisdiction of
18 the court, and also people --

19 THE COURT: It doesn't say "potential jurisdiction."
20 It says "potential defendants."

21 MR. BRETTLER: I misspoke, your Honor.

22 "Other potential defendants" could mean anyone subject
23 to the jurisdiction of the court, and the court here in the
24 Southern District of Florida would have had personal
25 jurisdiction over Prince Andrew had she alleged a claim against

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1 him in 2009.

2 THE COURT: On what basis?

3 MR. BRETTLER: On the basis that she has accused
4 Prince Andrew of being part of this criminal enterprise, the
5 sex trafficking conspiracy. She also --

6 THE COURT: She accused him of being a beneficiary of
7 the enterprise, not a participant as I read it.

8 MR. BRETTLER: I think our readings are different than
9 your Honor. She claims that she was trafficked to a bunch of
10 different categories of individuals, including royalty,
11 academia, businessmen. Those individuals would be part of the
12 same enterprise, especially because she contends that Prince
13 Andrew was aware that she was being trafficked. It wasn't as
14 if she is alleging that this was some secret trafficking
15 arrangement.

16 She claims -- obviously we contest and deny -- that
17 Prince Andrew knew that she was being sexually trafficked and
18 took advantage of her and sexually abused her. That clearly
19 brings Prince Andrew into the ambit of "other potential
20 defendants."

21 In addition, she listed the category of royalty in her
22 complaint as the people who have allegedly abused her.

23 LAW CLERK: Excuse me, Judge. Sorry to interrupt.
24 This is James, Judge Kaplan's law clerk. I just have been
25 informed that the broadcast is not transmitting to the number

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1 that the public is connecting to. Do you want to hold off and
2 try to troubleshoot that or continue, Judge?

3 THE COURT: No. We are going to continue, but please
4 contact Andy Mohan and get him to get it fixed.

5 LAW CLERK: We're working on it.

6 MR. BRETTLER: Sorry, your Honor.

7 If I may continue, Ms. Giuffre's allegations in this
8 complaint are that Prince Andrew was aware of the sex
9 trafficking scheme, and he acted in furtherance of that scheme.
10 As a coconspirator, undoubtedly he would be subject --

11 THE COURT: How did he further it?

12 How did he allegedly further it?

13 MR. BRETTLER: Ms. Giuffre alleges that because he was
14 aware of the sex trafficking and agreed, according to
15 Ms. Giuffre, to have sex with her or to sexually abuse her,
16 that he was furthering that scheme and allowing her to be
17 trafficked to him to other individuals.

18 Obviously, Prince Andrew denies and disputes those
19 allegations, but those are her allegations in this lawsuit, not
20 only in this lawsuit but in the 2009 lawsuit that she filed in
21 the Southern District of Florida and settled in 2009, receiving
22 payment from Mr. Epstein and releasing him, his associates, and
23 all other potential defendants.

24 That phrase has to be given meaning, and Ms. Giuffre
25 and her legal team have not ascribed any other potentially

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1 reasonable meaning to "other potential defendants." It must go
2 beyond Mr. Epstein or this broad category, you know, that the
3 head football coach of the university of Kansas could fit into.

4 THE COURT: What is a potential defendant as
5 distinguished from a defendant?

6 MR. BRETTLER: A defendant in that case would be
7 someone actually named in the lawsuit, for instance, Jeffrey
8 Epstein. He was obviously named as a defendant. A potential
9 defendant is someone who Ms. Giuffre knew that she had claims
10 against at the time that she filed the lawsuit, did not
11 necessarily name that individual --

12 THE COURT: Mr. Brettler, the relevant language is
13 "all other persons who could have been named in the lawsuit,"
14 and it's then converted into a defined term, "other potential
15 defendants."

16 Now, by definition, that excludes anybody who already
17 had been named as a defendant. What's a potential defendant as
18 opposed to someone who could have been named as a defendant but
19 had not been?

20 MR. BRETTLER: I don't think there would be a
21 distinction, your Honor. In that case it's just a distinction
22 without a difference, if it's a distinction at all.

23 THE COURT: Yes.

24 And that comes to another point, doesn't it? Because
25 the word "potential" must have meant something, and if there's

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1 no difference, it means nothing.

2 MR. BRETTLER: No, we agree that it meant something.
3 I thought your Honor's question was what is the difference
4 between a potential defendant and a defendant who wasn't named.
5 I think those are the same thing.

6 THE COURT: I agree with you.

7 MR. BRETTLER: Right. And Prince Andrew was not
8 named.

9 THE COURT: At least on the face of it I agree with
10 you. But this is an instance where the use of the word
11 "potential" is the use of a word to which neither you nor I can
12 find any meaning at all.

13 MR. BRETTLER: I respectfully disagree, your Honor. A
14 potential defendant is someone who could have been named as a
15 defendant in that lawsuit but was not, unlike this head coach
16 at the University of Kansas.

17 THE COURT: That's a difference, is it? That it is
18 someone who could have been named and was not?

19 MR. BRETTLER: Pardon me, your Honor?

20 THE COURT: Excuse me. You were saying I think that
21 that's different from saying someone who was not named as a
22 defendant. I want to understand how.

23 MR. BRETTLER: Right. Someone who was not named as a
24 defendant but could have been by virtue of the allegations that
25 Ms. Giuffre was aware of at the time and had articulated, at

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1 least in broad strokes in her complaint, to include Prince
2 Andrew.

3 I Think it's unquestionable that Prince Andrew could
4 have been sued in the 2009 Florida action. He was not. And,
5 therefore, he was a potential defendant and a releasee under
6 the 2009 settlement agreement by its unambiguous terms.

7 I don't even understand how there could be any
8 question as to whether "other potential defendants" had a
9 meaning ascribed to it. Clearly it did. Clearly Ms. Giuffre
10 intended to release a broad category of individuals, including
11 royalty, including businessmen. And the fact that she --

12 THE COURT: So this would include, you know, the
13 Sultan of Brunei, too, right?

14 MR. BRETTLER: If there were allegation against the
15 Sultan of Brunei, then absolutely it would. It certainly is
16 evidenced by the fact that she did in fact intend to dismiss
17 Professor -- or release Professor Dershowitz from any liability
18 as when this release was raised to her as a potential defense,
19 and under threat of Rule 11 sanctions Ms. Giuffre dismissed her
20 claims against Professor Dershowitz.

21 THE COURT: None of that is in the record.

22 And, secondly, to the extent I've seen documents
23 outside the record, they're not consistent with that.

24 And, thirdly, Mr. Dershowitz was an attorney for
25 Epstein, and attorneys were released specifically in the other

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1 part of the clause you rely on.

2 MR. BRETTLER: It is true that he was an attorney for
3 Epstein. He was not an attorney for Epstein in that case to my
4 knowledge. And I don't believe it's accurate --

5 THE COURT: So what? So what?

6 MR. BRETTLER: Well, in settlement agreements, your
7 Honor, not all attorneys are released from liability when
8 language says that, you know, "the party and his attorneys."
9 That means his attorneys in that case, not every attorney in
10 the world.

11 THE COURT: Well, I mean, I understand that you are
12 asserting that, but that doesn't mean it's true. "True" is the
13 wrong word to use. It doesn't mean it's correct. There could
14 be a different view.

15 MR. BRETTLER: There could be a different view. I
16 don't think the Court needs to get to a different view, given
17 the plain language of the statute, which all of the case law
18 instructs us is what we are supposed to look at to examine what
19 the party's intent in reaching that agreement was.

20 Your Honor had mentioned that the dismissal of
21 Mr. Dershowitz or Professor Dershowitz is not in the record,
22 but my understanding is that the Court said that it would take
23 judicial notice of the pleadings that were filed in other
24 actions with this Court. That is one of the pleadings that was
25 filed.

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1 THE COURT: If I think it is appropriate.

2 MR. BRETTLER: Pardon?

3 THE COURT: If I think it is appropriate.

4 MR. BRETTLER: Absolutely, your Honor. Of course. If
5 the Court thinks it is appropriate to take judicial notice of
6 it, that document and that dismissal would be in the record.

7 But it is clear that the release agreement itself was
8 intended to include other peoples, or other persons besides
9 Mr. Epstein and his legal team and his closest associates. The
10 term "other potential defendants" was intended to have a
11 meaning. It did have a meaning. And the fact that Ms. Giuffre
12 made allegations against royalty and academia and businessmen
13 to whom she was allegedly trafficked would certainly indicate
14 to any reasonable person reading that agreement that she
15 intended to release those claims.

16 And that would make sense from, you know, any outsider
17 looking at the reasons why these parties would enter into such
18 an agreement, Mr. Epstein would never want to have to be
19 dragged back into a lawsuit were she to sue Prince Andrew later
20 and Mr. Epstein would then have to be subpoenaed and to give
21 testimony. He's trying to resolve all claims, fully --

22 THE COURT: I understand that that's a possible and
23 let's assume for the sake of argument a reasonable view. But
24 we don't have Mr. Epstein here to say that's in fact what his
25 view was.

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1 And there is another view. The other view might be
2 this: Mr. Epstein was offering X dollars to get the broadest
3 release, let's assume, that the other party was willing to give
4 him.

5 From the other party's point of view, the objective
6 might well have been to give the narrowest release that she
7 could give, thus preserving her options against other people in
8 the future for the maximum price.

9 Wouldn't you agree?

10 MR. BRETTLER: Your Honor, I don't -- I certainly
11 agree with the concept that she would want to give the most
12 limited release possible, but that completely is at odds with
13 the language in the agreement that includes a very, very broad
14 release of other potential defendants. That is not consistent
15 with the notion that she wanted to limit her release to
16 Mr. Epstein or his attorneys or his associates.

17 THE COURT: But the limitation may well inhere in the
18 use of the phrase "other potential defendants" as it's more
19 specifically defined elsewhere in Section 2. "Who could have
20 been included as a potential defendant," that's the operative
21 language.

22 MR. BRETTLER: That's correct.

23 THE COURT: So the real question is what did she have
24 in mind and what did he have in mind, if anything, in referring
25 to persons who could have been included?

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1 MR. BRETTLER: We are instructed, your Honor, under
2 the case law to look at the plain language of the contract.
3 And the fact that there could be a different view is not the
4 rule for admission of parol evidence.

5 THE COURT: We are not talking about the parol
6 evidence rule now. We are talking about the question of
7 whether there are two or more reasonable interpretations of the
8 language "who could have been included as a defendant."

9 I understand your point of view. I understand also
10 the other point of view; that is, that it was narrower than you
11 suggested. And certainly if what the intention of the parties
12 had been would have been to release any other person or entity
13 who was in any way involved in any of the sexual activities
14 with Mr. Epstein or others, it would have been easy to say it.
15 Those are two, it seems to me at least on the face of it,
16 possibly reasonable all tentative views.

17 MR. BRETTLER: I don't disagree that it would have
18 been easier to say it, your Honor. It also would have been
19 easy to leave out this phrase "other potential defendants."
20 There's no reason, if she was looking for a limited release, to
21 include such a broad encompassing group of people.

22 THE COURT: Maybe Epstein wouldn't give her the half a
23 million dollars for clearer language, clearer language
24 protective of her.

25 MR. BRETTLER: I don't know why she would agree to

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1 include such broad release language if she were looking to
2 limit her release to Jeffrey Epstein only. She could have
3 stopped it at, "we are releasing the second parties."

4 THE COURT: She could have, but that's not the only
5 alternative.

6 MR. BRETTLER: I don't know what another reasonable
7 alternative would be, because clearly the phrase "other
8 potential defendants" has to have some meaning beyond that of
9 the second parties.

10 THE COURT: But your adversary doesn't argue that it
11 is limited to the second parties. That's not the point they
12 make.

13 MR. BRETTLER: Who would it be limited to? I think
14 that is the point. Unless I'm misunderstanding my adversary's
15 argument, I don't know who would be included in "other
16 potential defendants" if it weren't all of these other people
17 who Ms. Giuffre alleged abused her. She could have sued them
18 and she did not. And therefore she waived her rights to sue
19 them when she entered into the 2009 release agreement and
20 accepted the money from Mr. Epstein. She didn't return that
21 money. She didn't return that money when she decided to file
22 this lawsuit.

23 THE COURT: Okay. I think we've covered this point as
24 well as it's going to be covered. If you want to take a few
25 minutes on the next point, now would be the time.

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1 MR. BRETTLER: Thank you, your Honor.

2 The next point is the sufficiency of -- the next point
3 I would like to raise, your Honor, is the sufficiency of the
4 allegations themselves in the complaint.

5 Ms. Giuffre needs to lock herself into a story now,
6 not some time in the future after she conducts discovery and
7 figures out where the chips may fall. She needs to allege
8 today, she needs to allege in her complaint against Prince
9 Andrew when he supposedly abused her.

10 I would like even a date, a month. We would settle
11 for a year. Right now all we have is that she was supposedly
12 17 years old. It could have spanned over, I guess, two
13 calendar years.

14 We don't even have a date, a time, a location other
15 than an apartment. We don't know when this was. And
16 Ms. Giuffre doesn't articulate what supposedly happened to her
17 at the hands of Prince Andrew.

18 She alleges in a group pleading fashion that Epstein,
19 Ghislaine Maxwell, and Prince Andrew abused her in conclusory
20 fashion. She doesn't explain what this alleged abuse was. She
21 was over the age of consent in New York, so she has to allege
22 that she was forcibly compelled to engage in unwanted sexual
23 contact. She does not allege that.

24 We do not know the details of this allegation, and
25 it's time that we do. Before Prince Andrew should be required

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1 to answer these very serious allegations, he should be told
2 what the allegations are. Specifically, not --

3 THE COURT: With all due respect, Mr. Brettler, that's
4 not a dog that's going to hunt here. I am sure you are as
5 familiar with the rules of pleading as I am, and she has no
6 obligation to do that in the complaint. I'll tell you that
7 straight up right now. It is not going to happen. You have
8 every right to that information when the parties engage in
9 discovery.

10 MR. BRETTLER: Your Honor, we would argue that her
11 claims should be tested in discovery. We shouldn't learn for
12 the first time in discovery when this alleged abuse occurred or
13 what the alleged abuse was. We should be told in the
14 complaint. If she's going to file a lawsuit alleging very
15 serious allegations that are 20 years old, we should be told
16 what those allegations were at the outset of this case, not
17 sometime in the future after she's able to test her theory.

18 THE COURT: Mr. Brettler, I understand your point. It
19 just isn't the law.

20 MR. BRETTLER: Okay.

21 Your Honor, I respectfully disagree that it is not the
22 law, especially in a case that she's bringing under the CVA,
23 where the only way that she can allege a complaint against
24 Prince Andrew 20 years after alleged abuse is for her to meet
25 the requirements of a 130 violation under the New York Penal

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1 Code. She doesn't plead that in the complaint.

2 Ms. Giuffre does not complain how she was forcibly
3 compelled, if she was forcibly compelled, what the alleged
4 misconduct was. All she says is, in conclusory fashion, that
5 she was sexually abused or forced to engage in sexual contact
6 against her will. That is not enough to even articulate a
7 claim under Article 130 of the New York Penal Law.

8 We allege, your Honor, also that based on these
9 same --

10 THE COURT: Counsel, you know for a certainty that I'm
11 obliged to accept as true on this motion the well-pleaded
12 factual allegations of the complaint.

13 Paragraph 37, "On one occasion Prince Andrew sexually
14 abused Plaintiff in London at Maxwell's home. During this
15 encounter, Epstein, Maxwell, and Prince Andrew forced
16 plaintiff, a child, to have sexual intercourse with Prince
17 Andrew against her will."

18 I must assume the truth of that allegation.

19 MR. BRETTLER: Your Honor, that is a quintessential
20 example of group pleading. She alleges that Prince Andrew,
21 Ghislaine Maxwell, and Jeffrey Epstein supposedly forced her to
22 do something against her will. We don't know who forced her.
23 We don't know how she was allegedly forced. We don't even know
24 what the alleged sexual misconduct was or when it occurred
25 based on that allegation.

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1 THE COURT: It was sexual intercourse, involuntary
2 sexual intercourse.

3 There isn't any doubt about what that means, at least
4 not since someone else was in the White House.

5 MR. BRETTLER: Well, your Honor, under Article 130 she
6 needs to allege more than involuntary sexual intercourse given
7 that she was of the age of consent in New York. She needs to
8 allege that she was forcibly compelled. And that means an
9 imminent threat of death, an imminent threat of harm, and there
10 is no such allegation in her complaint.

11 THE COURT: Okay. I think we better move to the next
12 point.

13 MR. BRETTLER: The next point, your Honor, would be
14 the duplicative claims of battery and intentional infliction of
15 emotional distress.

16 It appears on the face of Ms. Giuffre's complaint that
17 she's alleging one set of circumstances that caused her harm,
18 alleged harm. She accuses Prince Andrew of sexual assault, and
19 she's trying to recover twice on that same theory, once for
20 battery, once for intentional infliction of emotional distress.
21 They're based on the same allegations in the complaint. One
22 incorporates the other by reference.

23 THE COURT: If they turn out to be the same
24 allegations, doesn't the single-satisfaction rule prevent any
25 multiple recovery?

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1 MR. BRETTLER: Yes, it does, your Honor. Absolutely.

2 THE COURT: Okay.

3 Next point.

4 MR. BRETTLER: And the last point, your Honor, is the
5 constitutionality. I mean, it could be the first point, too,
6 but it should be the last point that the Court needs to
7 consider.

8 I think the distinction between this case and other
9 cases challenging the constitutionality of the New York CVA is
10 the fact that this case was filed after the second temporary
11 extension of CVA in light of COVID.

12 No Court has ruled on whether that extension was
13 permissible. And whether Ms. Giuffre's complaint would be
14 timely is dependent on the constitutionality of the CVA. I
15 understand that the Court may be loath to address
16 constitutional issues of state law. However, this is an issue
17 of first impression for this Court. There has been no ruling
18 on whether former Governor Cuomo's extension of the CVA was
19 constitutional. He did so twice by executive order, extended
20 the statute of limitations.

21 And Ms. Giuffre could have filed this lawsuit anytime
22 since the window opened in 2019. She didn't until five days
23 before the window finally closed in August of 2021. We will
24 argue that that is an untimely complaint, that the former
25 governor's decision to extend the statute to give alleged

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1 victims of childhood sexual abuse additional time to file their
2 complaint is unconstitutional. It is vague.

3 And Prince Andrew should not be dragged into this
4 court 20 years after alleged abuse based on a statute that
5 arbitrarily decided to revive statutes of limitations.
6 Memories fade, your Honor; witnesses die, as very evident in
7 this case; witnesses may be incarcerated; documents disappear;
8 documents are destroyed in the ordinary course; you know,
9 people change their testimonies, people forget things.

10 This does not satisfy due process requirements under
11 the New York State Constitution. It puts a huge burden on the
12 defense here to have to try to, you know, find documents,
13 materials, witnesses from more than 20 years ago, when one of
14 the --

15 THE COURT: Mr. Brettler, what exactly is your
16 argument, your constitutional argument? Is it that an
17 extension was in and of itself unconstitutional, given the
18 passage of time, which would apply independent of further
19 extension that you attribute to Governor Cuomo. Or is it that
20 there's a problem with the further extension alone? And, if
21 so, what is the problem?

22 MR. BRETTLER: There certainly is a problem with the
23 further extension. I wouldn't limit it to it being the only
24 problem.

25 As we have argued in our pleadings, we believe the

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1 statute was unconstitutional from the get-go. We recognize
2 that other trial courts in both New York state and in this
3 district have disagreed and found the statute constitutional,
4 but none has ruled on this issue of the subsequent extensions
5 due to COVID. There were two.

6 THE COURT: So now let's focus on that. What's the
7 constitutional argument about the further extensions?

8 And before you answer that one, what was the sum total
9 in days, months, or years of the further extensions?

10 MR. BRETTLE: One year and seven or eight months, I
11 believe, your Honor.

12 THE COURT: Okay. Thank you for that.

13 Now what is a the constitutional argument that's
14 uniquely applicable to the one year and seven plus or minus
15 months?

16 MR. BRETTLE: It's completely arbitrary. That
17 extension was done by executive order, not by the legislature
18 convening and passing a new law. The extension just said
19 because of COVID. This is not a case where we have a plaintiff
20 who's unsophisticated or unrepresented.

21 THE COURT: All right. Can you tell me this: Have
22 you briefed the question of the governor's power to issue these
23 extensions as a matter of state law?

24 MR. BRETTLE: We have not briefed them, your Honor.
25 We absolutely can brief that if the Court wishes for further

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1 briefing on this issue.

2 And, you know, I believe that, you know, the governor
3 may have the authority to enter executive orders. It doesn't
4 mean that there's unilateral authority to decide to extend a
5 statute and extend the time for a sophisticated party like
6 Ms. Giuffre, who was well represented by counsel, to file a
7 lawsuit. And even then she waited until five days before
8 prior --

9 THE COURT: So is the constitutional argument
10 regarding the governor's authority dependent on the facts
11 concerning this plaintiff, or is your argument a general
12 argument --

13 MR. BRETTLER: Well, it is a --

14 THE COURT: -- having to do with anybody who sued
15 during the extended period, that is, one year and seven months.

16 MR. BRETTLER: It is a general argument, your Honor.
17 And I think it's particularly illustrated in this case.
18 Because we're not dealing with a party that was unable to get
19 to the courthouse due to COVID. In fact, Ms. Giuffre was in
20 Australia, healthy as far as we know, not prevented from
21 contacting her attorneys or authorizing them to file this
22 lawsuit at any time prior to the five days before the
23 expiration.

24 THE COURT: I take it, to use the language of another
25 area, your challenge is a facial attack on the one year and

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1 seven months, not an as-applied attack?

2 MR. BRETTLER: I think it's both. But I think it is a
3 fair to say that there is a facial attack. But there also is
4 an as-applied attack given the status of Ms. Giuffre, given the
5 fact that she's represented by very sophisticated attorneys and
6 that --

7 THE COURT: So then I take it your position is that
8 another plaintiff who sued at the end of the
9 one-year-and-seven-month extension who was not similarly
10 represented and who had been sick for the intervening period,
11 that claim would be timely?

12 MR. BRETTLER: Not necessarily, your Honor, because I
13 am not certain that the statute itself is constitutional and
14 whether the New York State legislature actually operated within
15 the bounds of the New York State Constitution and the due
16 process clause by extending the statute or by reviving the
17 statute of limitations on a 20-plus-year-old claim. I am not
18 certain and I don't agree that that is constitutional. I
19 certainly don't think that the additional --

20 THE COURT: Suppose it is. Suppose it is.

21 MR. BRETTLER: Suppose it is. I don't think that the
22 additional extension due to COVID, that would apply to healthy
23 individuals who had every means of accessing the courthouse
24 during the pandemic; that that as applied is unconstitutional.

25 And facially I would take the position that -- I do

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1 take the position that it is unconstitutional for the governor
2 to have extended it. And it's even worse in a case like this,
3 where the party took advantage of that extension and waited
4 until five days prior to the final expiration of this statute
5 when she's been healthy all along and has been represented by
6 counsel and has given plenty of interviews all over the world
7 over the past decade about this alleged abuse. For her to
8 claim that she had to wait until five days before the statute
9 was expiring were she filed this lawsuit is inherently unfair
10 and unjust.

11 And the case should be thrown out. The case should
12 absolutely be dismissed for lack of jurisdiction and certainly
13 because of the release that we discussed, because of the
14 duplicative claims in the battery and IIED, and the fact that
15 this is a time-barred action because the CVA claims revival
16 provision is unconstitutional.

17 THE COURT: Okay. Thank you.

18 MR. BRETTLER: Thank you, Judge.

19 THE COURT: Whom do I have the pleasure of hearing on
20 behalf of the plaintiff.

21 MR. BOIES: Your Honor, this is David Boies. I will
22 be responding with the Court's permission.

23 THE COURT: Go ahead.

24 MR. BOIES: May it please the Court, let my begin by
25 addressing the constitutional issue, which is the last issue

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1 that was raised. The argument that counsel makes today is not
2 the same as, indeed is inconsistent with the argument that they
3 made in their motion to dismiss. In their motion to dismiss,
4 they did not attack Governor Cuomo's action. In fact, on pages
5 27 and 28 of their motion to dismiss, they not only exclusively
6 attack the legislative revival, but they contrast what the
7 legislature did with what Governor Cuomo did. So I don't think
8 that the argument that they are making now with respect to
9 Governor Cuomo is one that they have raised in their motion.
10 And indeed I think their motion makes clear that they are
11 attacking the legislative decision, and I think that a number
12 of courts have addressed that legislative decision in terms of
13 its constitutionality.

14 As several of those courts have noted, the New York
15 courts themselves have never held unconstitutional a
16 legislative act. I think with that clarification I would rest
17 on our briefs, at least as to that issue, unless the Court has
18 a question.

19 With respect to the question as to whether or not the
20 complaint is clear, both with respect to the paragraph of the
21 complaint that the Court noted as well as paragraph 39 of the
22 complaint, I think the complaint makes clear with respect to
23 the sexual intercourse and the sexual touching what is alleged.

24 Counsel's argument today that we have to allege some
25 imminent threat of death is belied by what they said in their

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1 motion to dismiss. For example, at page 8 of their reply, and
2 this is a quote from what they say at page 27, "Giuffre and
3 other similarly situated individuals may establish lack of
4 consent by an 'implied threat' or for certain offenses by 'any
5 circumstances in which the victim does not expressly or
6 impliedly acquiesce,'" citing the New York penal statutes. So
7 as Prince Andrew's counsel recognized in preparing their
8 motion, the lack of implied consent or the lack of consent is
9 far broader than simply a threat of imminent death.

10 Let me turn just briefly to the question of the
11 release.

12 One of the issues that counsel raised was what is our
13 explanation for what "potential defendants" means. We would
14 concede at the outset that the term "potential defendants" is a
15 term that has potentially more than one interpretation.

16 But what we think the most reasonable interpretation
17 of that is, is someone who meets two criteria: One, they were
18 subject to the jurisdiction of the Florida court; and, two,
19 they were someone who engaged in the kind of activity that was
20 alleged in the claims that were asserted in that Florida
21 action.

22 Prince Andrew was not subject to the jurisdiction.
23 That's one independent reason why he's not a potential
24 defendant.

25 And, second, he was not the person who engaged in the

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1 kind of conduct that was at issue there, which was all conduct
2 that violated federal trafficking statutes, not the battery,
3 the intentional infliction of emotional distress, The state law
4 claims that are at issue here.

5 THE COURT: There could be overlap, couldn't there,
6 between some of the federal statutes and the common law claims?

7 MR. BOIES: Yes. Absolutely, your Honor. There could
8 be overlap. But that overlap would have to be where both the
9 federal claim and the state claim overlapped. And here the
10 state claim that we are asserting does not overlap the federal
11 claim that was involved in the 2009 federal action.

12 For example, the only claim that defendant asserts
13 that was made in the Florida 2009 action that would cover
14 Prince Andrew was the third count, and they identify this in
15 their motion to dismiss, which is to transport somebody for the
16 purpose of illegal sexual activity.

17 There is no allegation that Prince Andrew was the
18 person transporting. There is no allegation that, you know,
19 Prince Andrew fell into the category of people who were doing
20 the trafficking. He was somebody to whom the girls were
21 trafficked. That is a different set of criteria.

22 So we think there are two independent reasons he's not
23 a potential defendant.

24 Second, and although counsel didn't really address
25 this except when he mentioned parol evidence in a different

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1 context, while parol evidence cannot be introduced to vary the
2 terms of a contract between the parties to the contract, the
3 rule is different with respect to someone who is not a party to
4 the contract. And here you have somebody who is not a party to
5 the contract. So even if, contrary to what we think, the
6 language was unambiguous, that he was a potential defendant,
7 parol evidence would be admissible.

8 THE COURT: Admissible for what purpose?

9 MR. BOIES: Admissible for showing the intent of the
10 parties, to show that the parties did not intend that Prince
11 Andrew or people like him would be a potential defendant.

12 THE COURT: Are you saying is that even if it was
13 absolutely unambiguous, clear as a bell, a third party could
14 assert, "Well, yes, I see that's what's written there, and I
15 understand what's written because it's clear as a bell, but the
16 real intention was different"?

17 MR. BOIES: It's sort of the opposite of that in a
18 sense, your Honor. It is that a third party couldn't do that.
19 But one of the parties to that contract in response to a third
20 party's claim could do that. In other words, if a stranger, a
21 third-party beneficiary to a contract.

22 THE COURT: I see. You are really on the other point.

23 MR. BOIES: Yes.

24 THE COURT: You are on the question of whether it was
25 the intention of the parties --

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1 MR. BOIES: Exactly.

2 THE COURT: -- independent of how clear the language
3 is --

4 MR. BOIES: Exactly.

5 THE COURT: -- to infer an enforceable benefit on the
6 defendant who was a stranger to the contract?

7 MR. BOIES: Exactly. That was exactly the point, your
8 Honor.

9 THE COURT: Okay.

10 MR. BOIES: The third thing that I would say is that
11 it's clear that the parties to a contract have the ability to
12 abandon or modify that contract, and if they have given rights
13 to a third-party beneficiary they have the power to abandon or
14 modify those rights, at least so long as the third party has
15 not reasonably relied to their detriment on what they have
16 promised that third party.

17 Here, first, there is no reasonable reliance. Prince
18 Andrew didn't even know about this release until recently.

19 And, second, we think the conduct of the parties
20 subsequent to that evidences either a modification or an
21 abandonment entirely of that --

22 THE COURT: I understand your argument there. But
23 that other document isn't before me I think.

24 MR. BOIES: It is not, your Honor. And the only
25 reason that I raise it is that what they're trying to do is to

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1 get the Court to focus at the motion to dismiss stage on an
2 affirmative defense.

3 The reason that that is not appropriate is that, when
4 they raise the affirmative defense, we will have all sorts of
5 things to say about it. We will be able to respond to that
6 affirmative defense by putting things in front of the Court
7 that demonstrate, for example, abandonment. We will go into
8 litigating something when it is actually put in front of the
9 Court.

10 The reason why affirmative defenses are not
11 appropriate for a motion to dismiss, it is not merely a
12 technical thing. It is a question of, when an affirmative
13 defense is interposed at the motion to dismiss stage, it is
14 before the plaintiff has had an opportunity to make a response
15 and to get in front of the Court the kinds of evidence that the
16 Court will need or a jury ultimately might need to decide the
17 issue.

18 I raise the modification point not because I'm asking
19 the Court to decide that, but because the fact that those kind
20 of issues are out there means that this is not the appropriate
21 time to be dealing with an affirmative defense.

22 THE COURT: Let me ask you another question.

23 What is the significance of the further part of
24 paragraph 2, which is the paragraph that contains the release
25 language upon which your adversary relies that reads, and I

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1 quote, "Additionally, as a material consideration in settling,
2 first parties," which refers to -- "and the second parties,"
3 which I -- is that the right way to say it?

4 MR. BOIES: Yes, your Honor.

5 THE COURT: -- "agree that the terms of this
6 settlement agreement are not intended to be used by any other
7 person, nor be admissible in any proceeding or case against or
8 involving Jeffrey Epstein, either civil or criminal."

9 What effect does that language have on the defendant's
10 assertion that this release construed his way is useable by him
11 in this case?

12 MR. BOIES: I see the Court's point, your Honor. It
13 does refer to second parties, and he would have to be included
14 in second parties in order to make his argument at all.

15 THE COURT: Well, isn't second parties a defined term?

16 MR. BOIES: Yes, it is, your Honor.

17 THE COURT: And what is it defined to be?

18 MR. BOIES: It is defined to be the other potential
19 defendants.

20 THE COURT: Really?

21 MR. BOIES: Hold on. I'm sorry. I apologize. The
22 second parties are the employees, agents, attorneys,
23 predecessors, successors, heirs, administrators, and assigns.
24 Those are the second parties.

25 THE COURT: Where do I find that?

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1 MR. BOIES: That is in --

2 THE COURT: I see. It is the first of paragraph 2.

3 MR. BOIES: Yes. So Prince Andrew, as an arguing
4 potential defendant, would not be a --

5 THE COURT: He is neither a first party nor a second
6 party.

7 MR. BOIES: Or a second party. That's right. He's
8 neither a first party or second party. That's right, your
9 Honor.

10 THE COURT: If that's true, what's the effect of the
11 sentence I read to you?

12 MR. BOIES: Then the first parties and second parties,
13 the first parties are Ms. Giuffre and Epstein, and so the
14 parties to the contract, and the second parties are agreeing --

15 THE COURT: I'm sorry. The first parties is Giuffre
16 and her agents, attorneys, predecessors, successors, heirs,
17 administrators and/or assigns.

18 MR. BOIES: Yes, your Honor.

19 THE COURT: It doesn't include Epstein.

20 MR. BOIES: No. No, Epstein is the second party.
21 Epstein and his employees is the second party.

22 THE COURT: Epstein and his agents and employees and
23 attorneys are second parties. It is right there in the first
24 part of the paragraph.

25 MR. BOIES: Right. I see the Court's point. What you

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1 have is Epstein and Giuffre --

2 THE COURT: Yes.

3 MR. BOIES: -- agreeing --

4 THE COURT: So the defense --

5 MR. BOIES: -- the settlement agreement --

6 THE COURT: -- in the --

7 MR. BOIES: -- is not --

8 THE COURT: -- is within the language of that sentence

9 I read you --

10 MR. BOIES: Yes.

11 THE COURT: -- is within the category of people who
12 are not entitled to use the terms of the settlement.

13 MR. BOIES: Your Honor, I see and I apologize for the
14 slowness on this. But I see exactly what the Court is saying.
15 What the Court is saying is that the parties actually
16 explicitly agreed that any third-party beneficiary rights would
17 have to be asserted by the parties to the contract and could
18 not be asserted by a potential defendant. What they were
19 saying is that the very terms of the contract, the very terms
20 of the settlement preclude --

21 THE COURT: Use by a third party.

22 MR. BOIES: Exactly, which is Prince Andrew. Prince
23 Andrew could not do that. The only person who could assert
24 this release in this case.

25 THE COURT: Would be Epstein.

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1 MR. BOIES: Would be Epstein, yes.

2 I think that's right, your Honor. I think that's
3 exactly right.

4 THE COURT: I bring your attention also to the portion
5 of paragraph 4, the last two full sentences on page 3., and I
6 ask you what the significance of that is.

7 MR. BOIES: I think that reinforces the point that was
8 made in the release paragraph, your Honor, where it says that
9 it can't be used in any court or other proceeding except to
10 enforce the provisions of the settlement agreement. And that
11 takes you back to the fact that only Epstein and Giuffre can
12 enforce the terms of the settlement agreement.

13 THE COURT: All right.

14 Anything else, Mr. Boies?

15 MR. BOIES: No, your Honor.

16 THE COURT: Okay. Mr. Brettler, I'll give you five
17 minutes, but I think it might be useful to for it to be used at
18 least in part to deal with the two points I raised with Mr.
19 Boies.

20 MR. BRETTLER: I agree, your Honor.

21 It sounded to me that Mr. Boies was conceding that
22 Prince Andrew was meant to be included in other parties. He
23 disagrees with me on whether or not that means Prince Andrew
24 has the right to assert this agreement as an affirmative
25 defense.

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1 THE COURT: Do you agree with that, Mr. Boies? I must
2 have missed it.

3 MR. BOIES: No, your Honor. Under the clear language
4 of the agreement, only Epstein and Giuffre can enforce the
5 terms of the agreement. That is, a third party can only
6 benefit from this contract to the extent that the party, the
7 actual parties to the contract wish to seek enforcement.

8 THE COURT: Okay.

9 Back to you, Mr. Brettler. I'm sorry to interrupt.

10 MR. BRETTLER: No, that's okay, your Honor.

11 I don't think that that is even a reasonable
12 interpretation of that paragraph when I am reading that
13 paragraph. I understand it to mean that the settlement
14 agreement could not be used to show evidence of Mr. Epstein's
15 guilt. It could not be used in conjunction with any other
16 lawsuit that he's being sued in, but it wouldn't make sense for
17 them to include language releasing other potential defendants.
18 Those other potential defendants didn't have a right to use
19 that contract, use that settlement agreement and release as an
20 affirmative defense. It just flies in the face of common
21 sense.

22 THE COURT: Don't you then run smack into the
23 provision in paragraph 4 which says this is all going to be
24 secret? They are not going to give anybody a copy of this
25 agreement and the terms can't be disclosed except to enforce

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1 the agreement?

2 MR. BRETTLER: And they have been disclosed.

3 THE COURT: Well, yes, now. But that's because of
4 various litigation.

5 But the point of the matter I think may well be that
6 paragraph 2 left enforcement of any rights in other potential
7 defendants, whoever they may be, in the hands of the
8 contracting parties.

9 And, to draw a line under that, paragraph 4 says the
10 contracting parties aren't going to tell anybody about this
11 agreement. And thus the position at least arguably would be
12 that Epstein and Giuffre had an agreement between themselves
13 that there was a release to other potential defendants,
14 whatever that means, but they weren't to know about it, those
15 people. And, in any case, the only people who could enforce it
16 were Epstein and Giuffre.

17 So that if somebody got sued, for example, you know,
18 the Sultan of Brunei -- I cast no aspersions there, I'm just
19 using a convenient example -- if someone got sued and Epstein
20 said, look, this person was within the release and it was okay
21 with Giuffre, then it could be made available and Epstein could
22 enforce it, but not otherwise.

23 MR. BRETTLER: Your Honor, that is not the law on
24 third-party beneficiary.

25 THE COURT: No. The law on third-party beneficiaries

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1 is that the agreement has to manifest a primary and substantial
2 purpose on the part of the contracting parties to confer a
3 right on the third party. And the point is it's pretty hard to
4 square such an intention with these two provisions, one that
5 says no third parties can enforce it and another that says the
6 parties, the contracting parties aren't going to disclose this
7 to third parties.

8 MR. BRETTLER: Your Honor, paragraph 7 of the release
9 agreement contemplates third parties enforcing it, as does the
10 law in Florida and New York, for whatever it's worth on
11 third-party beneficiary.

12 THE COURT: Well, bring my attention to the language
13 you rely on.

14 MR. BRETTLER: Sure. Melissa, if you have that handy,
15 maybe you could read that to the judge, because I have to pull
16 that up on my computer.

17 MS. LERNER: Your Honor, paragraph 7, the enforcement
18 paragraph of the release agreement, states in relevant part
19 that the party -- looking at the first paragraph, should the
20 federal court not retain jurisdiction, the parties and any
21 third party agree that the courts of the 15th Judicial Circuit
22 of Palm Beach County shall have exclusive jurisdiction over the
23 subject matter and shall have personal jurisdiction over the
24 parties and third parties. In the event of an enforcement --
25 it goes on about notice and service, and in --

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1 THE COURT: I --

2 MS. LERNER: Sorry.

3 THE COURT: Go ahead. I didn't mean to interrupt.

4 MS. LERNER: Not at all, your Honor. That's the
5 relevant language. There is a contemplation that third parties
6 also are agreeing to the jurisdiction of the court for
7 enforcement purposes.

8 THE COURT: Isn't it perfectly clear that Epstein and
9 Giuffre had no ability to bind a third party to accept the
10 jurisdiction of a Florida court?

11 MR. BRETTLER: Your Honor, if I may, it wouldn't be up
12 to Epstein and Giuffre to determine whether or not the Florida
13 court had jurisdiction over Prince Andrew or any other
14 potential defendant. It is clear based on the nature of
15 allegations in Ms. Giuffre's complaint of a criminal conspiracy
16 that those parties would --

17 THE COURT: Mr. Brettler, that is off the point, with
18 all due respect.

19 A and B cannot sign a contract between them that says
20 that C consents to the jurisdiction of any court unless they
21 have power of attorney from C, right?

22 MR. BRETTLER: Of course.

23 THE COURT: Of course. So this provision that says
24 that they are contracting between Giuffre and Epstein that
25 third parties agree that the Palm Beach County court would have

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1 jurisdiction is completely void, isn't it?

2 MR. BRETTLER: No, your Honor. Because if Prince
3 Andrew were to use this document to file a lawsuit against some
4 defendant, Ms. Giuffre or someone else, and intended to rely on
5 this agreement as the basis for his claim, he would be subject
6 to the jurisdiction of the Palm Beach court.

7 THE COURT: Of course he would. But this language
8 that your colleague read to me deals with a situation in which
9 the third parties' consent to jurisdiction is necessary, and
10 the document purports to grant that consent in the benevolence
11 of Giuffre and Epstein, which they have no power to do.

12 Isn't that right?

13 MR. BRETTLER: I understand your Honor's point, but my
14 reading of the agreement is different. If Prince Andrew were
15 to use this agreement as the basis for a claim, he would have
16 to be subject to the court in Florida to do so. The fact that
17 he's an alleged coconspirator of Jeffrey Epstein would have
18 subjected him to the Court's jurisdiction, thus encompassing
19 him within this very broad definition of "other potential
20 defendants."

21 And the last point that I would like to raise, your
22 Honor, is that the release does not limit the release claims to
23 those federal claims that were asserted in the Florida action
24 like Mr. Boies had suggested. The release expressly releases
25 federal and state claims which would include these battery

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1 claims and claims for intentional infliction of emotional
2 distress, should the court determine that they are not
3 duplicative.

4 THE COURT: Okay. I thank you all. I appreciate the
5 arguments and the passion.

6 You will have a decision pretty soon, but I am not
7 going to define that further. It will have to be sufficiently
8 definite so that it is not enforceable.

9 That said, there is no stay of discovery in place.
10 The scheduling order is in effect, and I assume you will act
11 accordingly.

12 MR. BRETTLER: Thank you, your Honor. Of course we
13 will.

14 THE COURT: Stay healthy.

15 MS. LERNER: Thank you, your Honor.

16 THE COURT: Thank you.

17 (Adjourned)
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